1968

Bartlett Electric, Inc. v. R. Derrell Ballard, Dba Ballard Construction Co., et al : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BARTLETT ELECTRIC, INC., a Utah corporation,
Plaintiff,

vs.

R. DERRELL BALLARD, dba Ballard Construction Co., et al,
Defendants and Counterclaimants.

R. DERRELL BALLARD, dba Ballard Construction Co., et al,
Cross Claimant, Respondent and Cross Appellant,

vs.

REED M. SMITH, et al,
Cross Defendants, Counterclaimants, Appellants and Cross Respondents.

Case No. 11302

APPELLANTS' BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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STATEMENT OF KIND OF CASE

This is an appeal from a judgment which awarded inadequate damages for breach by the contractor of an agreement for the construction of a business building.

DISPOSITION IN LOWER COURT

The trial court awarded damages for the cost of repair of certain defects, but refused to award damages for the losses to the owners which resulted from the breach of contract.

RELIEF SOUGHT ON APPEAL

The appellants seek a reversal of the judgment with directions to the trial court to determine and award damages for all losses to the owner which resulted from the failure of the contractor to construct the building in accordance with the contract.

STATEMENT OF FACTS

On January 4, 1962, Reed M. Smith and Barbara D. Smith, hereinafter referred to as the "owners," made a written contract with Richard D. Ballard, hereinafter referred to as the "contractor," for the construction of a dry cleaning and laundry building. The contract is

on a standard printed form with detailed building specifications attached. (See Exhibits 1 and 2). The contract required completion of the building 90 days after receipt of notice to commence work and provided that, "The Owner shall pay the contractor for the performance of the contract the sum of $38,750.00." The contract provided for payment as the work progressed and for the hold back of 10% of each payment, to be withheld as the final payment. Article 9 of the contract requires the contractor to remedy defects due to faulty materials or workmanship and Article 11 provides that, "Payments otherwise due may be withheld on account of defective work not remedied. . ." Article 18 provides that the architect " . . . shall certify to the owner when payments under the contract are due and the amounts to be paid."

The contractor commenced work on the building sometime prior to January 19, 1962. (R. 268). The evidence is uncontradicted that the east wall of the building was constructed without (1) dampproofing, (2) the application of emulsion to water proof it, and (3) the forming of a gutter to carry water away before it could accumulate and seep through the wall. (R. 318, 321, 322). The contractor admitted that the east wall was built without following the specifications in the particulars set out above. (R. 280). The failure to construct the east wall in accordance with the specifications resulted in substantial leakage. This was described by the contractor as follows:

"Q. (By Mr. Skeen) Now, before you made this effort to waterproof in that six-inch space, I will ask you whether leaks occurred in the building.

A. They did.

Q. And where did the leaks occur?

A. The joint between the foundation wall and the block wall where the block wall sits on the foundation wall.

Q. Did you personally observe the leaks?

A. Yes, I did.

Q. Could you describe the flow of water through the east wall?

A. You mean in amount?

Q. Yes.

A. It depends, of course, on the amount of moisture that was outside. I would say a moderate amount through five or six different places.

Q. Was it enough to pool on the floor?

Q. Yes.

Q. And the water stains are left on the walls, are they not?

A. On the concrete wall they are in an area where it doesn't detract from the appearance of the building, of course.

Q. When you observed the leaks, did you see any places where the water was actually squirting out of the east wall?

A. I wouldn't say it was squirting out. I would say it was running out.

Q. It was running out?

A. Yes." (R. 284-285)

It was described by the owner, Smith, as follows:

"THE WITNESS: There was water in the building, puddles of water along the east part of the building where the water had come through the wall and you could see of course the wall was still wet. I don't recall definitely if it was raining that day or not, but there was water in the building. . . "

"THE WITNESS: There was broken block and mortar, some pieces of wood, and in the bottom, near the bottom, one of the pilasters had pushed from the wall and made practically a dam in the bottom of the six inches about midway in the building. So it did dam water at that point, and water didn't just run down the wall at that point. It would spray out of the wall, just like a silcock, I guess, you would say, was turned on. . . ."

"THE WITNESS: The screen openings, as I remember, three screen openings in the drier room, I guess you would call it. I think they are called combustion screen openings. They are about eighteen inches by twenty-four inches. And they were fastened into the block, and when we observed the water coming in the way it was at this one point, we removed the screen to see why the water was coming in, so much water at that one location. And we observed the pilaster had pushed to the east, so that it made a dam of about six to eight inches high to hold the water back. . . ." (R. 380, 381).

Tenant Stephens testified:

" . . . But there was an area in the back wall which oh, where it actually squirted through the wall. . . "

"... Q. And was that actually squirting water in the south portion of the building?

Q. Yes.

Q. Then what would you say with respect to the occurrence of leakage in April of 1962 throughout the length of the building?

A. Oh, it was a general situation. The blocks were wet three courses up from the top of the foundation. . . . It was the entire length of the building, as I observed it and it was three courses up was saturated with water." (R. 545, 546).

The water leaked through the wall in six places. (R. 365).

When the contractor constructed the east wall he not only failed to construct the gutter (R. 349) and to dampproof the wall, but he left the space between the retaining wall and the east wall full of junk, parts of blocks, mortar, boards and debris. (R. 349, 350, 363, 429, 430, 508). Efforts to remedy the condition failed. (R. 445, 448, 499, 500).

The architect testified that if the dampproofing had been applied and the gutter constructed as provided by the specifications, there would have been no leakage. (R. 327).

The leakage of water through the east wall has continued despite one effort by the contractor and three efforts by the owners to stop it. (R. 499-501, 444, 446).

The agreement, Exhibit 1, required the contractor to complete the building 90 calendar days after receipt

of notice to commence work. Work was to commence five days after date of contract. (See Exhibit 2.) The building was leased before it was constructed. (Exhibit 6.) The lease provided that the building would be "completed . . . ready for fixtures on or before April 1, 1962." Delay would be penalized at the rate of $20.00 per day. Both the owner and lessee testified that the delay had cost the owner rentals on the south part of the building in the amount of $1050.00. (R. 383, 552).

On May 14, 1962, the contractor, by letter, notified the architect of his intention to terminate the construction agreement, effective seven days from the above date. (Ex. 8).

On May 9, 1962, May 28, 1962, and on July 17, 1962, the architect gave the contractor written notice of specific items not completed. (Exhibits 14, 15 and 16). (See also R. 276, 342, 315, 322-325, 333). These included the following principal items:

1. Dampproofing of the east wall. (R. 314).

2. Construction of overhead service instead of underground. (R. 315).

3. Exposed conduit on the roof. (R. 315).

4. Broken asphalt. (R. 316).

Because of the default of the contractor the owners were compelled to employ labor and supply material to complete the construction and to make the building rentable. See the testimony of Reed Smith, which is not

contradicted that he expended $793.18 in an effort to complete and repair the building and parking area. (R. 391-397, 446).

The evidence is clear that the architect never accepted the building and never authorized final payment.

> "Q. Mr. McDermott, yesterday, as I recall, you indicated that before you could approve a claim for payment to Mr. Ballard, it would be necessary for you to make another inspection in the company of Mr. Ballard and to determine what had been done and what had not been done and what items should be allowed and what items should not be allowed; is that correct?
>
> Q. Yes.
>
> Q. Have you ever asked Mr. Ballard to accompany you and make that inspection?
>
> A. Yes, I have letters in my file that indicated we wanted a final inspection in order for him to get final payment and accept the building for the owner.
>
> Q. What are the approximate dates of those letters?
>
> A. July 17, I think, was the first one indicating a final inspection and getting the items completed, which is I think an exhibit you have. The first part of it reads: 'This firm has anticipated your call for a final inspection but has not heard from you for over three weeks. On inspection we find the following major items not complete to date. . . .'
>
> Q. And that is the list we considered yesterday.
>
> A. Now, upon receiving Mr. Ballard's letter of

the 13th of August requesting payment, in which he also listed three credits he would issue, I then wrote another letter August 16 stating that 'Before this firm can approve a final payment for the above project, a date must be set for final inspection. Also we must have an itemized payment request marked, 'Final Showing, All Charges and Credits.' Please contact this office and set a date for a final inspection, and we would be happy to process the final request for payment.'

Q. Did you receive a response to this letter from Mr. Ballard?

A. I have nothing in the record in the way of response.

Q. Did he orally say he would or would not accompany you in making the final inspection?

A. To the best of my judgment, no.

Q. And that correspondence terminated that aspect of it as far as your file discloses? . . .

.. . .A. Yes.

Q. Now, are you ready and willing now to undertake an inspection for the purpose of determining what items should be allowed and what items, if any, should be disallowed?

A. Surely.

Q. And have been ready and willing to do that at all times; is that true?

A. Yes." (R. 347-349).

There is no evidence in the record that the contractor ever completed the work in accordance with the

agreement, Exhibit 1. On the contrary there is abundant evidence that because of the failure of the contractor to construct the drainage gutter and to dampproof the east wall it was still leaking in several places at the time of trial. Estimated cost of dampproofing it as of the time of trial varied from an estimate of $85.00 by a witness who had not looked behind the wall, (R. 529, 531), to $3000.00 by the architect, (R. 352), and $4000.00 by witness Maggard, who had been hired by the contractor to dampproof the wall after it had been constructed and who had failed. (R. 502).

On October 18, 1962, the contractor recorded a mechanics' lien claiming that the first labor and material were furnished on February 10, 1962, and the last labor and material were furnished on October 2, 1962. (See Ex. 12).

During the trial the case between Bartlett Electric, Inc., and Ballard was settled by a stipulated judgment. (R. 494). The remaining issues between the owners and contractor on the cross claims and counterclaim were tried and submitted for decision to Hon. Ray Van Cott, Jr. He died before deciding the case. It was then transferred to Hon. Stewart M. Hanson, who decided it on the transcript of testimony taken by Judge Van Cott [except for the testimony as to attorneys fees.] (R. 595-602).

The trial court made findings to the effect that the contractor had "substantially" performed his obligations under the contract except for certain minor

matters which were "corrected or attempted to be corrected" by the owners. The owners were given credit for certain items which were not completed by the contractor. (R. 204-207).

Judgment was entered in favor of the contractor and against the owners for $6,316.95 and the owners' counterclaim and their cross claim against the contractor were dismissed. The owners' cross claim against the United States Fidelity and Guaranty Co. was likewise dismissed.

The owners have appealed to this court from the judgment in favor of the contractor and the surety company, and the contractor has cross appealed from the judgment in his favor on the ground that the trial court erred in failing to find that the contractor had a mechanic's lien and in failing to award to the contractor an attorneys fee as provided by the mechanics' lien statute.

STATEMENT OF POINTS

1. The failure of the contractor to plead and prove certification by the architect for payment bars recovery.

2. The owners were entitled to damages for breach of contract.

3. The court erred in holding that the owners were not entitled to recover for the full amount expended by them to complete the building.

4. There is no evidence supporting certain material findings of fact.

ARGUMENT

1. THE FAILURE OF THE CONTRACTOR TO PLEAD AND PROVE CERTIFICATION FOR PAYMENT BARS RECOVERY.

The building contract, Exhibits 1 and 2, contain the following provisions for payment:

> "Article 9. Contract Sum — The Owner shall pay the Contractor for the performance of the contract subject to the additions and deductions provided therein in current funds, the sum of Thirty-Eight Thousand Seven Hundred Fifty dollars. ($38,760.00).
>
> Article 4. Progress Payments — The Owner shall make payments on account of the contract, upon requisition by the Contractor, as follows: On or before the 10th day of each month an amount equal to 90% of work completed and materials purchased and labeled for job, or suitably stored on site. 10% of each payment to be withheld as final payment.
>
> Article 5. Acceptance and Final Payment — Final payment shall be due 15 days after completion of the work, provided the contract be then fully performed, subject to the provisions of Article 16 of the General Conditions."

Article 12 of the General Conditions:

> "Payments: Payments shall be made as provided in the Agreement. The making and accept-

ance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens or from faulty work appearing thereafter, as provided for in Article 9, and of all claims by the Contractor except any previously made and still unsettled. Payments otherwise due may be withheld on account of defective work not remedied, liens filed, damage by the Contractor to others not adjusted, or failure to make payments properly to subcontractors or for material or labor."

Article 18 of the General Conditions:

"The Architect's Status: The Architect shall be the Owner's representative during the construction period. He has authority to stop the work if necessary to insure its proper execution. He shall certify to the Owner when payments under the contract are due and the amounts to be paid. He shall make decisions on all claims of the Owner or Contractor. All his decisions are subject to arbitration."

The law is well settled that by these provisions the parties made the issuance by the architect of the necessary certificate a condition precedent to recovery.

"Very commonly, however, by the terms of the building contract, the certificate is in the nature of an award binding on both parties. The award is made a condition precedent to the builder's right of recovery, but when made is conclusive on both parties in the absence of collusion or fraud or such other reason as in the particular jurisdiction is held sufficient excuse for the non-performance of the condition." Williston on Contracts, 3rd Ed. Vol. 5, pp. 805-807.

See also 13 Am. Jur. 2d Sec. 34, p. 37. We quote:

> "Accordingly, where the contract provides that the work shall be done to the satisfaction, approval or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator between the parties and the parties are bound by his decision in the absence of fraud or gross mistake. *The same rule applies where it is provided that payments shall be made only upon the certificate of the architect.*" (Emphasis added).

See also, 54 A.L.R. 1261, 110 A.L.R. 138.

Gillespie Land and Irr. Co. v. Hamilton, 43 Ariz. 102, 29 P. 2d 158.

Guarantee Title & T. Co. v. Willis, 38 Ariz. 33, 297 P. 445.

Neale Construction Co. v. Topeka Sewer Dist., 178 Kan. 359, 285 P.2d 1086.

We quote from 100 A.L.R. 140:

> "Where the contract provides that no money shall be payable except upon the certificate of the architect or engineer, or upon his written acceptance, or that compensation shall be made upon estimates furnished by the engineer or archietct, such certificate or estimates or conclusive in the absence of fraud or mistake."

The contractor served notice on the architect that he intended to terminate the building contract on May 21, 1962, (Ex. 8) and he did not respond to the archi-

tect's letters listing uncompleted and defective work and suggesting an inspection. See page 9 of this brief.

It should be noted that the architect, Mr. McDermott, was called by the contractor and the contractor is bound by his testimony.

There is no conflict in the evidence as to the failure of the contractor to obtain a certificate for payment as required by the plain language of the contract. We submit that the evidence is clear and uncontradicted that the contractor "botched" the job by constructing the east wall of the building (12 feet high and within six inches of the existing retaining wall, which contained weep holes for discharge of water) without dampproofing as provided by the specifications (p. 7, Ex. 2); that he made an effort to correct the situation by employing witness Maggard to do the dampproofing after the east wall was fully constructed; that such efforts failed (R. 499-501); that he gave notice of termination (Exhibit 8); and by his inaction forced the owners to complete the job to minimize their loss of rent under an existing lease. The job was *never* completed by the contractor and obviously he was in no position to demand or receive a certificate for payment from the architect. Furthermore, he did not even cooperate to the extent of accompanying the architect on the final inspection. (R. 347, 348). Under the provisions of the contract and the evidence it is clear that action was prematurely filed and the judgment for the contractor must be reversed .

2. THE OWNERS WERE ENTITLED TO DAMAGES FOR BREACH OF CONTRACT.

The specifications, Exhibit 2, contain the following provisions which relate to the dampproofing of the east wall of the building and the plans require the construction of the gutter behind the wall to carry off water:

> "Dampproofing shall be applied on all foundation walls where floor line is below grade. Dampproofing shall be two coats of asphalt emulsion proofing mopped on exterior face and over footing at wall intersection." Section 7-05, p.7.

See plans, Ex. 3, and R. 322 with reference to the gutter.

It is admitted by the contractor that he did not dampproof the wall as required by the specifications. He said:

> "Q. And had the wall been completed without dampproofing?
>
> A. The block wall?
>
> Q. Yes.
>
> A. Yes.
>
> Q. And had the concrete foundation been completed without damp-proofing?
>
> A. Yes.
>
> * * * *
>
> Q. I will ask you again whether you deliberately failed to damp-proof the exterior side of the east wall, 110 feet in length, until after the entire

wall had been put up or whether it was an oversight.

A. It was no oversight, and I did not do it because I couldn't get a ruling on what needed to be done.

Q. As a matter of fact when you tried to get the ruling in May the wall was already up?

A. Right, that's right." (R. 279, 286)

It was also admited that the failure to dampproof the wall resulted in leakage. (R. 307, 308). The testimony of Reed Smith is that the building was not accepted for occupancy until May 29, 1962. (R. 383). All efforts by the contractor and owners to stop the leaks failed. (R. 499-501, 444-446). The gutter was not constructed (R. 349, 350) and could not be constructed without tearing out part of the wall and starting over again. (R. 350, 351).

There was an obvious and substantial breach of contract by the contractor. What was the proper measure of damages?

The law is clear that the injured party is entitled to damages which are naturally and proximately the result of the breach. We quote:

> The law is well settled that "in case of a breach of contract the measure of damages is the amount which will compensate the injured person for the loss which the fulfillment of the contract would have prevented or the breach of it has entailed." 25 C.J.S. p. 843.
>
> "Expenses imposed on the injured party by

reason of a breach of contract are recoverable." 25 C.J.S. 755.

"The expenses which may be recovered are those which are the natural and proximate consequence of the breach." 25 C.J.S. 756.

"In case of defective performance of a building or construction contract the measure of the allowance must necessarily be a sum as will compensate for the injury resulting from the defect." 25 C.J.S. 859.

"The measure of damages in a proper case may also include losses directly and proximately resulting from the defective performance as for example, losses resulting from delay. . . It has also been held that the measure of damages should include recovery for such other damage as the owner has sustained by reason of defective construction until such time as it could have been remedied in exercise of reasonable diligence." 25 C.J.S. 863.

Instead of following the law the trial court determined what the out of pocket expenditures were and should be to remedy the several items of defective work and omissions .The findings of fact were apparently drafted with the thought that it was not the contractor's obligation to complete the building in accordance with the specifications, and that it was the obligation of the owners to assume and take over that obligation to remedy the defects and to complete the building. See R. 204 and 205 where the court found that "A. Smiths expended $100.00 in an attempt to dampproof the east wall of the building." Other similar findings follow.

The court denied any damages for delay and loss of rent. This was error. The loss was the direct result of the contractor's admitted failure to follow the specifications regarding dampproofing and to complete the building on time. That the owners suffered loss of rent on both the north and south units is uncontradicted in the record. (R. 383, 552, 398). The law is clear that loss of rent is compensable in cases where the contractor failed to complete the building on time or constructed a defective building.

The loss of rent is recoverable.

25 C.J.S. p. 731, note 77.

Henderson v. Oakes-Waterman Bldrs., 44 C.A. 2d 615, 112 P.2d 662.

Lesmark v. Pryce, 334 F.2d 942.

Reichardt v. Limms, 93 N. J. Law, 117, 106 A. 378.

The contractor did not even attempt to complete the building or to remedy defects. On May 14 he notified the architect of his intention to terminate. (Ex-8). The owners did not get what they bargained for and in order to make his building rentable undertook to mitigate damages by employing help to make repairs. *This did not relieve the contractor of his obligation.* He is still liable for all losses suffered by the owner which naturally and proximately resulted from the breach of contract. The trail court erred in failure to

find that there was a breach of contract by the contractor and in failure to assess damages in an amount sufficient to compensate the owners for the losses suffered by them including loss of rent.

3. THE COURT ERRED IN HOLDING THAT THE OWNERS WERE NOT ENTITLED TO RECOVER THE FULL AMOUNT EXPENDED BY THEM IN AN EFFORT TO COMPLETE THE BUILDING.

As indicated above in the statement of facts there were numerous items of defective and unfinished work on the building when the contractor served notice of termination in May, 1962. These included, (1) failure to dampproof the east wall (R. 314, 386); (2) construction of overhead instead of underground electric wiring, (R. 315, 387); (3) exposed conduit on the roof, (R. 387); (4) broken asphalt, (R. 315, 386); no lock on door, (R. 392); (6) leaning light standard, (R. 386); (7) no flashing around dryer vents, (R. 386); (8) one aluminum elbow missing, (R. 387); (9) sandtrap covers not painted and inadequate clean-up (R. 387, 388); (10) defective and incomplete paint job, (R. 387); and (11) failure to install plumbing as required by specifications, (R. 411-415); and (12) the downspout was not installed as provided by the specifications. (R. 386).

In an effort to remedy the defects and to make the building rentable, the owners expended money as shown

in the following table and the amount allowed by the court, if any, is set opposite each item:

Item	*Owners Paid*	*Court Allowed*
1. Efforts to prevent leakage through east wall. (R. 392-394, 444, 447)	$235.45	$100.00
2. Asphalt work in parking area. (R. 392, 446)	223.77	100.00
3. Cylinder Lock (R. 392)	7.67	7.67
4. Breaking Concrete - Light Stand (R. 392)	8.75	00.00
5. Welding and resetting light stand (A. 392)	14.42	00.00
6. Concrete for resetting stand (R. 393)	6.37	6.37
7. Hauling broken concrete (R. 393)	10.00	00.00
8. Flashing around dryer vents (R. 393)	25.00	25.00
9. Installing header box, moving downspout (R. 396)	52.50	00.00
10. Material and labor to fill in lower ventilator openings (R. 395)	15.00	00.00
11. Replacement of dryer alum. elbow (R. 396)	2.77	2.77
12. Labor, Richard E. Long, painting sand trap covers, digging hole, cleanup (R. 395)	52.50	25.00
13. Cleaning reflectors, rewiring light standard (R. 395)	15.00	00.00
14. Cleaning sand traps (R. 395)	4.00	00.00
15. Plumbing bid to complete according to specifications (R. 413-415)	770.00*	83.10

Item	*Owners Paid*	*Court Allowed*
16. Difference between the cost of overhead and underground wiring (R. 438)	100.00*	00.00
17. Items of credit agreed to by the contractor and not allowed the court. (R. 313)	227.00	00.00
18. Asphalt work (R. 446)	120.00	00.00

*These items were not paid, but estimates of cost were made.

There is no conflict in the record as to the amounts spent on items 1, 2, 4, 5, 7, 9, 10, 12, 13, 14 and 18 and there was no conflict in the evidence as to the estimated cost of completing items 15 and 16 according to the specifications.

It was error for the court to disregard the uncontradicted evidence and to, in effect, compromise downward the money actually expended to mitigate damages for the breach of contract.

4. THERE IS NO EVIDENCE SUPPORTING CERTAIN MATERIAL FINDINGS OF FACT.

Findings of fact Nos. 3, 12, 17, 18, 27, 29 and 30 (R. 204-207) are not supported by any competent evidence, but are indeed contrary to the evidence.

Finding No. 3 - "Ballard Substantially Performed His Obligations Required Under the Contract and Was Paid Prior to Suit $33,174.00."

By the contract, Exhibit 1, the contractor agreed to construct a building in accordance with the specifications, Exhibit 2. This he failed to do. On May 14, 1962, when he served notice of termination, he had constructed a building against a retaining wall with weep holes for discharge of water without dampproofing such east wall on the outside with two coats of asphalt emulsion, or dampproofing it at all. When it rained water squirted or ran through tre wall and *three courses of building blocks were saturated.* (R. 545, 546). According to the testimony of architect, McDermott, the contractor's witness, by whose testimony the contractor is bound, the situation could not be remedied without taking down part of the east wall and applying asphalt emulsion to the blocks as they were placed in position, at a cost of about $3,000.00. This would, of course, be a major operation and would result in disturbance to the tenants and would at best be a patched up job. It is submitted that with this defect the building contract was not substantially performed.

> "It has been said that deviations from the general plan of so essential a character that they cannot be remedied without partially reconstructing the building, do not come within the rule of substantial performance, which would allow the contractor to make compensation for unsubstantial omissions, and that a building contract is not substantially performed where a considerable sum of money would be required to remedy incompleteness in matters of detail, some of which are structurally remediable and others are not."

13 Am. Jur. 2d. p. 47.

Elliott v. Caldwell, 43 Minn. 357, 45 N.W. 845.

Spence v. Ham, 163 N.Y. 220, 57 N.E. 412.

"A contractor who intentionally and deliberately failed to build in accordance with the specifications cannot rely upon the rule of substantial performance."

13 Am. Jur. 2d pp. 45, 46.

Elliott v. Caldwell, supra.

FindingNo. 12 - "Except For the Items Specified Above, Ballard Completed the Building As Called For In the Contract."

Ballard gave notice of termination on May 14, 1962 and never completed the building. When he received letters from the architect suggesting a final inspection and requesting the contractor to accompany him, the contractor did not respond. (See page 9 this brief). The owners had to complete numerous unfinished work items and to correct defects left by the contractor and expended sums of money not referred to in the findings. (See the table in this brief, pp. 21, 22).

Finding No. 17 - "McDermott Granted Such Extension Under Such Circumstances As Implied A Waiver Or Extension Until Such Time As the Then Inclement Weather Would Break Permitting the Commencement of Construction."

There is no evidence in the record that McDermott granted an extension of time.

Finding No. 18 - "Ballard Completed the Construction According To and Within the Time Specified In the Contract."

The contract, Exhibit 1, requires the construction to be completed in 90 days (see Article 2) and the invitation for bids included in Exhibit 2 requires construction to begin within five (5) days after the contract is made. The contract is dated January 4, 1962, so the contractor was obligated to begin work on January 9, 1962. He wrote a letter dated January 10, 1962, (R. 106) to the architect requesting an extension, which confirms that this was his understanding. The building should have been completed by April 9, 1962. As indicated above the contractor has *never completed* the construction in accordance with the specifications or at all. The owners spent $793.18 in an effort to complete it to the extent that it was rentable.

Finding No. 27 - "Smiths Suffered No Loss of Rental Caused by Ballard."

The only testimony in the record as to loss of rent was given by Owner Reed Smith and Tenant Stephens. (R. 383, 398, 552). He lost $1080.00 because of delay in the construction and completion of the south unit (dry cleaning and laundry) and was unable to rent the north unit for several months because it was not completed. Water was squirting and running through

the wall when it rained, making it impossible to place tile on the floor and to otherwise complete the space to make it rentable. (R. 383, 398, 552).

Findings Nos. 29 and 30 - "Smiths Have Suffered No Damages Cognizable Under the Labor and Material Payment Bond, No. 69000-12-76-62, Or Any Other Labor and Material Payment Bond, Nor Under A Performance Bond, No. 69000-12-76-62, Or Any Other Bond Issued by United States Fidelity and Guaranty."

"United States Fidelity & Guaranty Has Performed All of the Obligations Owed by It To the Smiths By Virtue of The Above Bonds."

The performance bond (Ex. 5) contains the following provision:

> "NOW, THEREFORE, the condition of this obligation is such that, if Contractor shall promptly and faithfully perform said contract then this obligation shall be null and void; otherwise it shall remain in full force and effect."

Obviously the surety is not released unless the contract was performed by the contractor. As indicated above there were substantial defects in the performance and the building was never completed in accordance with the specifications. The United States Fidelity and Guaranty has not performed and findings Nos. 29 and 30 are unsupported by the evidence and are erroneous.

CONCLUSION

The owners did not get the building they bargained for and the contractor substantially broke the contract and abandoned all efforts to complete the building. Justice requires that the owners be fully compensated for all losses suffered as a result of the admitted breach of the contract by the contractor. The trial court ignored the law, awarded only trifling amounts to the owners and left them with an incomplete and defective building.

It is respectfully submitted that because of the many errors pointed out above this case must be reversed.

E. J. SKEEN

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